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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

W. HAROLD SELLERS and ROBERT DUPRE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether there should be relief available to Petitioners when the United States Court of Appeals refuses to follow the clear principles of law enunciated by this Court which not only denies Petitioners due process of law, but also undermines the precedent set by this Court in *Kyles v. Whitley* and *United States v. Bagley*.

Whether the suppressed evidence and newly discovered evidence would have conclusively affected the instructions given, or failed to be given, to the jury, which resulted in fatal structural errors.

Whether Petitioners' convictions were obtained in violation of 18 U.S.C. § 201(c)(2).

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Appendix B — Order And Reasons Of The United States District Court For The Eastern District Of Louisiana Dated January 20, 1998, Filed January 21, 1998 And Entered January 22, 1998 ..... 2a

Petitioners, W. Harold Sellers and Robert Dupre, respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The *per curiam* opinion of the United States Court of Appeals for the Fifth Circuit in *United States v. Sellers* was issued November 23, 1998, under Docket No. 98-30133, is referenced in the Table of Decisions Without Reported Opinions at __ F.3d __ (5th Cir. 1998), and is attached hereto as Appendix A. The Order and Reasons entered by the District Court on January 21, 1998, and referenced in the *per curiam* opinion of the United States Court of Appeals for the Fifth Circuit is attached hereto as Appendix B.

GROUNDS FOR JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was issued on November 23, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

18 U.S.C. § 371, which provides in relevant part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1014, which provides in pertinent part: "Whoever knowingly makes any false statement . . . for the purpose of influencing in any way the actions of any institution the accounts of which are insured by the FDIC, shall be fined . . . ."

18 U.S.C. § 1344, which provided in pertinent part, at the time applicable to this offense:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice — to defraud a federally chartered or insured financial institution; or to obtain any of the moneys, funds, credits, assets, securities, or other property owned by or under the custody or control of a federally chartered or insured financial institution by means of false or fraudulent pretenses, representations, or promises, shall be fined not more then $10,000, or imprisoned not more than five years, or both.

18 U.S.C. § 1957, which provides in pertinent part:

> Whoever knowingly engages or attempts to engage in a monetary transaction in criminally derived property this is of a value greater then $10,000 and is derived from a specific unlawful activity shall be punished as provided. . . .

18 U.S.C. § 201(c)(2), which provides in pertinent part:

> whoever directly or indirectly, gives, offers or promises anything of value to any person for or because of the testimony . . . to be given . . . as a witness upon a trial, hearing, or other proceeding . . . shall be fined under this title or imprisoned for not more than two years, or both.

STATEMENT OF THE CASE

The Petitioners were indicted on August 13, 1993, as a result of their involvement with a $69.5 million loan made by Oak Tree Savings Bank ("OTSB") to LaJolla Pacific Equities, Inc. ("LJPE"), a corporation of which the Petitioners were shareholders. Despite several procedural skirmishes, the progress of discovery in this case was uneventful. Defense counsel were given access to documents in the possession of the government at the New Orleans offices of the Federal Bureau of Investigation ("FBI"). After a review of the documents, defense counsel were satisfied that the documents made available to them were pertinent to, and supported the theory of the Petitioners' defense. In the course of their discovery, the Petitioners uncovered a redacted and incomplete seven page Examination Report on OTSB. By Motion of February 7, 1994,

Petitioners requested the Examination Report in its entirety. In response, the government stated that it did not possess the Examination Report, and identified its author as Michael McCann of the Federal Home Loan Bank Board. Exh. 19, Motion for New Trial. In actuality, the report was authored by Greg Goggans, who was employed by the Office of Thrift Supervision. Mr. Goggans attended most, if not all, of the trial, but was never identified by the prosecution as the true author of the Examination Report.

Part of the defense presented at trial was that the Petitioners' corporation, LJPE had been induced to enter a business relationship with Landmark Land of California ("LOCAL"), a large developer of golf course communities, in exchange for LOCAL arranging to cause a loan in the amount of $69.5 million to be made to LJPE from its affiliated savings & loan in New Orleans, Louisiana — OTSB.

Throughout the trial, the Petitioners' contended that OTSB did not operate as a true savings and loan. Instead, OTSB's true function was to provide a source of federally insured capital to OTSB's parent, Landmark Land ("Landmark") to support Landmark's acquisition and development of real estate throughout the United States. The Petitioners sought to introduce evidence to prove that OTSB did not make loans based on a borrower's ability to repay, but based solely on the recommendation of Landmark, or LOCAL. As a result of the Petitioners' relationship with LOCAL, Ernie Vossler ("Vossler"), LOCAL's president, and John Ohanian ("Ohanian"), LOCAL's vice-president, any statements or representations made by the Petitioners were not relevant to Vossler and LOCAL's "pawn shop" lending philosophy and were not made with the intent to defraud OTSB.

At their trial, the Petitioners attempted to present evidence to support these theories of the case. This theory was based on their position that they did not make any misrepresentations to OTSB. At the heart of this theory is LOCAL's "pawn shop" lending philosophy: that LOCAL was a co-venturer with the Petitioners in the real estate transactions at issue; that the loans made by OTSB were for the purpose of financing Landmark and LOCAL's acquisition of real estate for development; and that OTSB never acted as a lending institution, but rather, as a funding source for investments by OTSB's parent corporation, Landmark. In short, the theory of the defense was that OTSB was not a lender making a credit decision,

but rather, acting as a "piggy bank" for its parent's development appetites. The government vigorously opposed introduction of evidence involving OTSB's California lending practices, and it was ultimately ruled inadmissible by the trial court.

The Petitioners also attempted to show that Landmark's "pawnshop lending," philosophy coupled with the fact that all negotiations for the loan were handled by Vossler and/or Ohanian, negated any intent on the Petitioners' part to defraud a federally insured financial institution. The Petitioners attempted to show that lending decisions of OTSB were being made by LOCAL and that documents provided to OTSB by the Petitioners were not scrutinized or relied upon in the loan evaluation process, and could not have been material to LOCAL or OTSB. There was limited testimony at trial establishing that lending decisions were made based on Vossler's determination of the value of properties.

LJPE owned four properties (Sunrise Ranch, Loma Linda, Moreno Valley and Lower Rancho Etiwanda) in what is known as the Inland Empire, which is located in the California counties of Riverside and San Bernardino. Testimony at trial was that LJPE had acquired the four properties with loans obtained from a private lender located in Dallas, Texas, called Braewood Corporation. Braewood was a subsidiary of Lomas & Nettleton. The loan funded by OTSB was used to retire the Lomas & Nettleton loan and to finance the purchase of a fifth parcel of real property known as the Upper Rancho Etiwanda tract, which was contiguous to the Lower Rancho Etiwanda tract.

On August 17, 1995, Mr. Sellers, along with his wife, children and others, were named as defendants in a lawsuit styled *Resolution Trust Corporation, in its corporate capacity v. W. Harold Sellers, et al.*; No. 395-CV-1822-H in the United States District Court for the Northern District of Texas - Dallas Division. The case was subsequently transferred to Houston, Texas, and upon its dissolution, the Resolution Trust Corporation was replaced by the Federal Deposit Insurance Corporation ("FDIC"). The case was subsequently restyled the *Federal Deposit Insurance Corporation as statutory successor to Resolution Trust Corporation v. W. Harold Sellers, et al.*, No. H-95-4833, in the United States District Court for the Southern District of Texas, Houston Division ("FDIC lawsuit").

In the course of discovery of the FDIC lawsuit, new evidence has surfaced, which, if known and provided to the Petitioners pursuant to the government's discovery obligations, would likely have caused the jury in New Orleans to acquit the Petitioners. In their Motion for New Trial, the Petitioners attached 21 exhibits which pertain to the newly discovered evidence and the manner in which it was received through the FDIC lawsuit. For the sake of clarity, the following table identifies the suppressed evidence, illustrates why such evidence would have made a different result at trial reasonably probable, and explains how the evidence was obtained.[1]

1. The table highlights some, but not all, of the evidence and affidavits submitted in support of Appellants' Motion for New Trial. The suppressed evidence is included with Appellants' Motion for New Trial in its entirety.

Exh. No. and description.	Why this evidence would have assisted the defense.	How the evidence was obtained, and why it should have been provided.
Exh 6; November 6, 1988 letter.	The handwritten notations on the letter belong to Ernie Vossler ("Vossler"), who testified he was not involved in negotiations for the loan amount. Vossler's handwriting shows that it was he, not Oak Tree Savings Bank ("OTSB"), who determined the loan amount.	This document was obtained in discovery of the civil matter *FDIC v. W. Harold Sellers, et al.* An unannotated version of the letter was produced in the criminal case. The government has offered no explanation as to why this document was not produced.
Exh. 7; November 16, 1988 letter.	The handwritten notations on the letter belong to Vossler, who testified he was not involved in negotiations for the loan amount. Vossler's handwriting shows that it was he, not OTSB, who determined the loan amount.	This document was obtained in discovery of the civil matter *FDIC v. W. Harold Sellers, et al.* An unannotated version of the letter was produced in the criminal case. The government has offered no explanation as to why this document was not produced.

Exh. 10; October 27, 1988 memorandum.	At trial, John Ohanian ("Ohanian") testified he received certain due diligence documents from LaJolla Pacific Equities, Inc. ("LJPE") in a sealed box. This document indicates that Ohanian reviewed the documents, and offered them to Vossler for his review. This document would have impeached Ohanian's testimony. The fourth page of this memo also demonstrates Vossler's involvement in negotiation of the loan amount, which is directly contrary to his testimony.	This document was obtained in discovery of the civil matter *FDIC v. W. Harold Sellers, et al.* The government has offered no explanation as to why this document was not produced.
Exh 12; Vossler's handwritten worksheet.	This document was Vossler's handwritten worksheet showing his calculations of Landmark's internal appraisal of LJPE's properties, and the notation "loan approved" for $61.5 million. This document further demonstrates that Vossler was not truthful in his testimony regarding his involvement in the loan.	This document was obtained in discovery of the civil matter *FDIC v. W. Harold Sellers, et al.* The government has offered no explanation as to why this document was not produced.

Exh. 13; December 7, 1988 letter.	This document directly supports the defense theory that the "loan" between LJPE and OTSB was actually a joint venture between LJPE and Landmark. This document would have been probative to this theory and served to negate the bank fraud counts.	This document was obtained in discovery of the civil matter *FDIC v. W. Harold Sellers, et al.* The government has offered no explanation as to why this document was not produced.
Exh. 16; October 5, 1998 letter.	The handwritten page attached to this letter belongs to Vossler. In this document, Vossler calculates the per acre value of Upper Etiwanda at $30,000, and proceeds to calculate a loan-to-value ratio of 60%, resulting in $5.6 million. This amount was then multiplied by 75% resulting in a loan amount of $4.2 million. This evidence indicates it was Vossler who determined the loan amount of Upper Etiwanda, not OTSB, and not based on the representations of the Appellants. This evidence would also have directly contradicted Vossler's testimony at trial.	This document was obtained in discovery of the civil matter *FDIC v. W. Harold Sellers, et al.* An unannotated version of this document was produced in the criminal case. The government has offered no explanation as to why this document was not produced.

Exh. 20; 1989 OTS examination report.	This document contains over fifty pages of criticisms of OTSB's routine practice of ignoring borrower's appraisals, due diligence documents, and also criticizes OTSB's practice of loaning large amounts of money at the direction of its parent, Landmark, without conducting underwriting. This document, had it been available to the defense, would have conclusively shown that OTSB was not capable of being influenced by the Defendants' representations, and would have served to impeach testimony by Ambler and Taylor that OTSB was a prudent lender.	Defendants received seven pages of excerpts from this document in the criminal trial. Defendants requested the entire document, and the government represented that the report was a product of the FHLBB, and had been authored by Mr. Michael McCann. In reality, the true author of the report, Greg Goggans of the OTS, attended nearly all of the trial. This full text of this document was later obtained in discovery of the civil matter *FDIC v. W. Harold Sellers, et al.* The government now contends that it was not obliged to disclose this document, as the OTS was not part of its "investigative team."
Exh. 21; Original Complaint.	This document illustrates the government has taken inconsistent positions in its litigation surrounding OTSB. In this complaint, the RTC alleged myriad counts of gross negligence against the officers and directors of OTSB, and sought to hold them accountable for all losses. This is diametrically opposed to the government's position taken at trial.	This document is not alleged to have been suppressed by the government, although the government did not divulge that such an action was going to be filed only months after the criminal trial. The entire lawsuit was dismissed due to the RTC's failure to file the complaint within the applicable statute of limitations.

The Motion for New Trial was also supported by trial testimony, deposition excerpts, and the affidavits of two attorneys. On the basis of this newly discovered evidence, the Defendants filed the Motion for New Trial alleging *Brady* violations due to the *government's suppression* of exculpatory evidence, and alternatively arguing that *even absent such suppression, the newly discovered evidence was of significant weight to mandate a new trial.* The government filed a characteristic response, claiming that defense counsel had failed to diligently pursue evidence. The district court denied Defendant's Motion for New Trial without conducting a hearing, apparently on the basis that the newly discovered evidence was "lacking in sufficient significance to undermine the verdict." The United States Court of Appeals for the Fifth Circuit affirmed the District Court's decision in a *per curiam* decision.

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT COURT ERRED IN FAILING TO CONDUCT AN EVIDENTIARY HEARING.

Many of the facts germane to this appeal depend upon a resolution of whether the government's protestations of innocence and ignorance are true. The government's brief spent much space proclaiming that all of the suppressed materials were equally available to the defense and the prosecution; that the OTS only had an "observer" at trial; that the suppressed information was not in FBI files; and that the RTC had no role in the case except to provide witnesses. These facts cannot be established by the government's unilateral and unsworn declarations especially in light of evidence which directly contradicts the government's claims. In order to determine these issues, the district court should have conducted an evidentiary hearing to determine whether there is any evidence to support the government's claims. Absent such a hearing, it was impossible for the district court to fairly weigh the government's claims and to determine what overall effect the government's suppression had on the fairness of the verdict. The trial court is prohibited from determining what is true or false or what is important or unimportant because this is the exclusive function of the jury. A reviewing court is no less prohibited. *Cannon v. Alabama*, 558 F.2d 1211 (5th Cir. 1979).

The necessity of the evidentiary hearing is even more apparent because the government provided no evidence to rebut the Petitioners' accusations that the prosecution had suppressed evidence. The district court's failure to hold an evidentiary hearing renders its order deficient

in two ways: (1) it lacks any discussion of the circumstances of the government's non-disclosure and suppression of evidence, *e.g.*, the good faith, bad faith, or inadvertence of the prosecutors; and (2), denied the Petitioners an opportunity to demonstrate the relevancy and materiality of the suppressed evidence in the factual context that might have been developed in an evidentiary hearing. The district court's failure to hold such an evidentiary hearing constitutes clear error. *United States v. Disston*, 582 F.2d 1108, 1111-12 (7th Cir. 1978). Here, as was the case in *Disston*, the petitioners brought forth evidence that had been suppressed by the prosecution. *Id.* In *Disston*, the court correctly noted that the degree of prosecutorial misconduct is directly probative as to what legal standard applies. *Id.* at 1112. For example, where the defendant specifically requested the suppressed evidence, as was the case here, and the prosecution is found to have withheld in bad faith, the evidence is far more likely to be "material" in the *Brady* context. *Id.*; *United States v. Esposito*, 523 F.2d 242, 248-49 (7th Cir. 1975).

Fortunately, *since the suppressed evidence is now part of the record*, it is not necessary to remand for an evidentiary hearing because it is a question of law, not fact, and within this court's discretion to grant a new trial. *United States v. Lloyd*, 71 F.3d 408, 410 (D.C. Cir. 1995). The government has failed to provide any evidence to rebut the Petitioners' position, and there is no dispute that the Petitioners specifically requested the 1989 OTS examination report. Under these facts, the evidence is "material," and a new trial is warranted and appropriate.

II. THE SUPPRESSED *BRADY* EVIDENCE IS SUFFICIENT TO WARRANT A NEW TRIAL.

A. The government was charged with knowledge of the suppressed evidence.

The modern interpretation of the *Brady* test is found in *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555 (1995) and *United States v. Bagley* 493 U.S. 667, 1055 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). Under *Kyles* and *Brady*, when salient information is under investigation by the prosecutor, *or any others acting on the government's behalf*, it must be disclosed to the defense. Failure to disclose evidence which meets the *Brady/Bagley* test constitutes a violation of due process, entitling the defendant to a new trial. *United States v. Newton*, 44 F.3d 913, 918 (11th Cir.), *cert. denied*, 116 S. Ct. 161 (1995).

". . . the state's obligation to disclose evidence favorable to the defense turns on the cumulative effect of all such evidence suppressed by the government." *Kyles*, 131 L. Ed. 2d 490, at 498. "*Bagley's* touchstone of materiality is a reasonable probability of a different result, and the adjective is important." *Id.* at 506. ". . . Once there has been *Bagley* error, as was claimed in this case, it cannot subsequently be found harmless . . ." *Id.* at 507. "One (shows) a *Brady* violation by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 506.

The *Brady* rule is based upon the requirement of due process. "If the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed." *United States v. Agurs*, 427 U.S. 97, 112, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976). "The Court in *Agurs*, distinguished three situations involving the discovery after trial of information favorable to the accused that had been known to the prosecution but unknown to the defense." *Id.* at 677.

> The third situation . . . is where the defense makes a specific request and the prosecution fails to disclose responsive evidence. . . . When the prosecutor receives a specific and relevant request, the failure to make *any* response is seldom, if ever, excusable.

Id. at 679.

> The government notes that an incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of independent investigation, defenses or trial strategies that it otherwise would have pursued. We agree that the prosecutor's failure to respond fully to a *Brady* request may impair the adversary process in this manner. And the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the non-disclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption. . . . The reviewing

> court should assess the possibility that such effect might have occurred in the light of the totality of the circumstances *and with an awareness of the difficulty of re-constructing in a post-trial proceeding the course that the defense and the trial would have taken, had the defense not been misled by the prosecutor's incomplete response.*

Id. at 682-683.

We have another government agency, working with the prosecution, as evidenced by their sitting adjacent to their counsel table during the entire trial, who had evidence requested by the defense but suppressed by the prosecution, which the defense contends was critical to a major defense theory. How could any reviewing court possibly determine the effect such testimony and physical evidence, the OTS Examination Report, would have had on the jury? Only the jury could make that decision — and only if they had the suppressed evidence. It could have put the whole case in such a different light as to undermine confidence in the verdict.

Petitioners submit that there is no doubt, or even refutation by the government, that *Bagley* error occurred, because the government responded to a *Brady* request by a *misleading and false reply*. Having occurred, it cannot subsequently be found harmless. *Kyles*, at 507.

The prosecution cannot excuse themselves for not "knowing about" the OTS Examination Report, unless they are trying to "substitute the (OTS) police for the prosecutor, or even the courts themselves, as the final arbiters of the government's obligation to ensure fair trials." *Kyles*, at 509. There is only one entity that could determine the effect the suppressed evidence could have had and that is the jury.

The intention of *Brady* suppressed evidence as interpreted by *Bagley* and *Kyles* and as quoted in the only case cited by the Fifth Circuit in their affirmation of the trial court's denial of Petitioners' Rule 33 Motion, *United States v. Gonzales*, 121 F.3d 928 (5th Cir. 1997), is clear, concise, and summarized succinctly with their quote ". . . a prosecutor . . . will tend to disclose a favorable piece of evidence. . . . And it will tend to preserve the criminal trial." *Kyles*, at 509. If there is any question at all, why not let the jury make the determination — by seeing and hearing *all* the evidence pursuant to due process?

Petitioners submit that the facts fall squarely within the "third situation . . . is where the defense makes a specific request and the prosecutor fails to disclose responsive evidence." *Bagley*, *id.* at 679. Petitioners' counsel made a specific request for the OTS examination report and the prosecutors responded by directing them to a person who was not even the author of the report — the true author sat only a few feet from the prosecutors' table during the entire trial, and obviously was assisting the prosecutor. "When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." *Bagley*, *id.* at 679. What about a response by the prosecutor that was *totally misleading and false?*

It would be impossible for a reviewing court, in a post-trial proceeding, to determine what the defense could have done with the requested evidence, particularly the OTS examination report which so clearly authenticated a major defense theory in pre-trial preparation and all during the trial itself. The jury did not hear this evidence; how can an appellate court, the Fifth Circuit, possibly put themselves in a better position to know what effect this evidence could have had on the verdict? With this evidence before the jury, there was a reasonable probability sufficient to undermine confidence in the outcome and the result of the proceeding would have been different.

The Court, in *Bagley*, felt strongly enough about their facts of requested but withheld evidence that they quoted from the government's brief wherein they conceded "that an incomplete response to a specific request not only deprives the defense of specific evidence, but also has the effect of representing to the defense that the evidence does not exist." The Court confirmed that such failure to respond to a *Brady* request may impair the adversary process. In this case, Petitioners' defense was irreparably impaired, not only by the government's failure to respond, but far more seriously by their *misleading and false response*.

Petitioners argue that a conviction for bank fraud requires proof of exposure of the institution to either actual or potential loss. The Fifth Circuit has repeatedly held than an element of such fraud is an intent to injure the bank by exposing it to actual or potential loss. *See United States v. Beuttenmuller*, 29 F.3d 973 (5th Cir. 1994); *United States v. Schnitzer*, 145 F.3d 721 (5th Cir. 1998). In both decisions the court reversed convictions for fraud saying that the transactions were value

for value, and were not sham transactions or otherwise exposed the bank to any more than ordinary risk associated with a financial transaction. "This type of transaction is not a 'criminal venture'." *Schnitzer*, 145 F.3d at 745. At trial it was undisputed that the property possessed great value, as testified to by the government's chief witness, Vossler.

The district court held that the evidence was merely cumulative, finding significant other evidence of value in the property. However, the argument missed the point. Under the *Beuttenmuller* and *Schnitzer* holdings of the Fifth Circuit, the fraud conviction requires a finding that the transaction was a sham, or not value for value. The materiality of these items of suppressed evidence must be judged for their cumulative effect, not item by item. *Kyles*, 115 S. Ct. at 1567. The lower courts made no effort to consider the cumulative impact of the many items suppressed by the government. Since the lower courts disposed of Petitioners' motion without an evidentiary hearing, this Court should assume that the facts alleged by the Petitioners are true as submitted. *Ashley v. Texas*, 319 F.2d 80 (5th Cir. 1963), *cert. denied*, 375 U.S. 931, 84 S. Ct. 331, 11 L. Ed. 2d 263 (1963); *Kirkpatric v. Whitely*, 992 F.2d 491 (5th Cir. 1993).

The district court and the Fifth Circuit found it "unnecessary to determine whether the government actually suppressed the newly discovered evidence." ". . . the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 102 S. Ct. 940 (1982). Thus, this issue is not only what the government knew, but what it should have known.[2]

The government's excuse for its failure to provide the exculpatory evidence discussed above is essentially that the OTS and RTC were not part of the "investigative team," and therefore the government was not obliged to produce this evidence.

The plausibility of the government's position is severely undercut by the undisputed facts. The government admits it kept an "open file" policy in the criminal case. [Gov't Brief at 14]. Unfortunately, the

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2. Deliberate misconduct would, however, lessen the Petitioners' burden of demonstrating materiality. *Esposito*, 523 F.2d at 248-49. The government has failed to present any evidence that it did not engage in such deliberate misconduct.

government misled the defense to believe this open file included all documents surrounding the OTSB-LaJolla transaction, not just the documents the government had decided to use in its prosecution. To reiterate a key point, the Petitioners requested a complete copy of the 1989 OTS examination report, and were misinformed by the government of its authorship and whereabouts.[3] Meanwhile, the true author of the suppressed 1989 OTS examination report, Greg Goggans, attended virtually all of the trial. The government's naked assertion that the OTS was not part of the "investigative team" does not dispel the common sense conclusion that Goggans was obviously involved in the government's case in some manner. Where the government makes an open file representation in the context of a *Brady* disclosure, the defense is entitled to rely on that representation. *United States v. Blakeny*, 912 F.2d 1029-31 (6th Cir. 1991), *cert. denied*, 502 U.S. 1008, 112 S. Ct. 646 (1991), *United States v. Atisha*, 804 F.2d 920, 924 (6th Cir. 1986) *cert. denied*, 479 U.S. 1067, 107 S. Ct. 955 (1987). *Kyles* holds that when information is under investigation by the prosecutor, or any others acting on the government's behalf, it must be disclosed to the defense. Failure to disclose evidence which meets the *Brady/Bagley* test constitutes a violation of due process, entitling the defendant to a new trial. *Kyles*, at 1565.

Even assuming the government's position that it was unaware of any of the suppressed RTC and OTS documents is truthful, this does not excuse the government's obligation to provide the information. An identical argument of the government was flatly rejected by the Ninth Circuit in *United States v. Wood*, 57 F.3d 733 (9th Cir. 1995). In *Wood*, the defendant was convicted for violating 18 U.S.C. § 371 for conspiracy to dispense a prohibited prescription drug. Wood had apparently prescribed GHB, a drug which the FDA had prohibited. *Id.* at 736. At a pre-trial hearing, the prosecutor informed the court that certain documents existed within the FDA files regarding studies done on GHB. The

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3. To clarify their position, the Petitioners do not merely imply that the government misrepresented the author and location of the 1989 OTS examination report. The government's misidentification is clearly shown in Exhibit 19 of the Motion for New Trial, where the government states, "the government is not in the possession of the entire report. Further, the author of the excerpts is Michael McNann. . . ." This representation is demonstrably *false* in light of the true author and agency of the examination report.

prosecutor represented that these documents had not been relied upon by the FDA. The defense did not ask for these studies. *Id.*

In a separate and unrelated trial, these studies were made public, and Wood sought a new trial on the basis of this evidence, which he contended was suppressed by the prosecutor in his trial. The district court denied Wood's motion, without giving any reasons and apparently without conducting a hearing. *Id.* The Ninth Circuit disagreed, and found that even though the prosecution was unaware of the contents of the studies, the FDA's knowledge was attributable to the prosecution, and thus the *Brady* rule had been violated. *Id.* at 737. Specifically, the court stated:

> For *Brady* purposes, the FDA and the prosecutor were one. We need not decide how far the unity of the government extends under the *Brady* rule. We hold only that under *Brady* the agency charged with administration of the statute, which has consulted with the prosecutor in the steps leading to prosecution, is to be considered as part of the prosecution in determining what information must be made available to the defendant charged with violation of the statute. *The government cannot with its right hand say it has nothing while its left hand holds what is of value.*

Id. (emphasis added). The *Wood* court concluded by noting, "[t]he government in the form of the prosecutor cannot tell the court that there is nothing more to disclose while the agency interested in the prosecution holds in its files information favorable to the defendant." *Id.*

Here, the government seeks to do exactly what was rejected by the *Wood* court. The RTC and OTS were obviously interested in the prosecution, as they had both consulted with the prosecution prior to and during trial. While the government may have tried to turn a blind eye to information it surely knew existed by not establishing a joint task force, this did not relieve it of its duty under *Brady* to provide all exculpatory evidence. This duty, coupled with the government's improvident acts of misrepresenting the location of the evidence when asked, strongly mitigates in favor of a new trial.

B. The suppressed evidence requires a new trial under Brady.[4]

The suppressed evidence, which is attached to Petitioners' Motion for New Trial, and referenced in part in the table above, is of sufficient weight to make a different result at trial reasonably probable.

1. *The suppressed evidence would have directly contradicted the testimony of the government's key witnesses.*

At trial, the government built its case around the testimony of Ernie Vossler, Landmark's real estate guru. Vossler repeatedly professed ignorance about the particulars of the LaJolla/OTSB transaction, and testified he was not involved in the calculation of the loan amount. These statements were untrue, as shown by exhibits 6, 7, 12, and 13 of Appellants' Motion for New Trial. These documents, which were either completely suppressed, or produced in incomplete form, include Vossler's handwritten notes on loan-to-value ratios, the appraisal Vossler had placed on the LaJolla properties, and the amount Vossler determined was to be loaned on Upper Etiwanda. Vossler testified at length regarding the Upper Etiwanda acquisition, which formed a key basis of the Petitioners' convictions. The government's suppression of any evidence, which would undercut Vossler's credibility, refresh his recollection, or show that he was lying, constitutes clear *Brady* error, and mandates a new trial. *Sanders v. Sullivan*, 863 F. 2d 218, 225 (2nd Cir. 1988) (stating correct analysis is whether the jury's verdict "might" be altered. *United States v. Seijo*, 514 F.2d 1357, 1364 (2nd Cir. 1975).

Of course, if the level of impeachment rises to show the witness committed perjury, the conviction must be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Agurs*, __ U.S. at __. Vossler's professed ignorance to his involvement in the transaction, an involvement which is conclusively shown by the suppressed evidence, would certainly have been ample ammunition for defense counsel to cast serious doubt on the veracity of Vossler's statements. The fact that other impeachment evidence was available to defense counsel does not render additional impeachment immaterial. *Napue v. Illinois*, 360 U.S. 264, 270 79 S. Ct. 1173, 1177 (1959); *United States v. O'Connor*, 64 F.3d 355, 359 (8th Cir. 1995) *cert. denied*, 116 S. Ct. 1581 (1996).

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4. It is notable that the Fifth Circuit has had at least twenty-seven opportunities to consider whether the government's suppression of *Brady* evidence was grounds for a new trial under *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555 (1995). It appears that the Fifth Circuit has only found a *Brady* violation since *Kyles v. Whitley* on two occasions.

The impeachment value of the suppressed evidence is not limited to Vossler. Both Ohanian and Ambler's testimony are inconsistent with the suppressed evidence. Ohanian testified that he received and forwarded a *sealed* box of LaJolla's due diligence documents, but his October 27, 1988 letters indicates he reviewed these documents. [Defs.' Mot. New Trial, Exh. 10]. Ambler's portrayal of OTSB as a traditional lender, and the purported lack of direction of OTSB's loan officers from Landmark is irreconcilable with the criticisms contained in the 1989 OTS examination report, and the RTC's position taken in its lawsuit against the directors and officers of Landmark.

The government's case hinged on the testimony of these witnesses. Evidence which would have permitted defense counsel to expose inconsistencies or outright false statements is material in the *Brady* context, as it casts serious doubt upon the fairness of the trial.

2. *The Suppressed Evidence negates the core allegations of the bank fraud, conspiracy, and false statement counts.*

The Petitioners were convicted of bank fraud and conspiracy to commit bank fraud. In order to violate 18 U.S.C. § 1344(2), the Appellants had to make material misrepresentations to OTSB, or those having the capability of influencing the decision of the lending institution to advance funds. *United States v. Campbell*, 64 F.3d 967, 975 (5th Cir. 1995). Any evidence tending to show that the lending institution was incapable of being influenced by certain borrower representations is directly probative to guilt under § 1344. *Id.* Notably, the government has never responded to this argument.

While the district court suggested a key defense theory — that OTSB was actually the "piggy bank" of its parent, Landmark Land Company, and was not duped by the Petitioners, was fully aired for the jury[5] — this does not excuse the government from its obligation to provide this exculpatory information to the defense. In fact, it is difficult to imagine a more probative and exculpatory piece of evidence than the 1989 OTS examination report, which contains repeated criticisms of OTSB's lending practices, lack of underwriting, and failure to use or rely upon appraisals.

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5. Petitioners respectfully disagree with the trial court's characterization, as this defense theory was severely restricted by the court at trial.

Contrary to the district court's suggestions, as repeatedly quoted by the government, the defense theory was *not* that OTSB's poor lending practices gave the Petitioners a license to dispossess OTSB of its funds. Instead, the defense theory was that OTSB acted solely upon the directions of its parent, Landmark, and not upon the representations of its borrowers. This theory is supported by the 1989 OTS examination report, which provides an unassailable source of evidence of the truth of this defense theory. The government even admitted that the 1989 OTS examination report "would have been incriminating." [Gov't Fifth Circuit Brief at 24]. Apparently recognizing this fact, the government misidentified the author and location of this examination report, while its true author sat mere feet from the defense table throughout the trial. Try as it might to spin this Court's attention from these undisputed facts, it is exactly this type of evidence which casts considerable doubt on the fairness of the jury's verdict and directly negates the core allegations relating to the bank fraud conspiracy and false statement counts.

3. *A new trial is warranted where the government has taken an inconsistent trial position.*

The inconsistent positions taken by the government justifies a reversal of the trial court's denial of the motion for new trial. A similar situation arose in *Blocker v. United States*, 274 F.2d 572 (D.C. Cir. 1959). In *Blocker*, the defendant's claim of insanity was contested at trial by three doctors employed by a government-run hospital. All three doctors testified that the defendant's sociopathic personality disturbance was not considered a mental disease or defect. *Id.* at 572-73. However, less than a month after the court entered a guilty verdict, another doctor from the same staff testified in another case that he and the superintendent of the hospital were then agreed that people suffering from sociopathic personality disturbances should be "labeled" as mentally ill, mentally sick, and suffering from mental disease. *Id.* at 573. The Court of Appeals for the District of Columbia found that this evidence warranted a new trial, and reversed the trial court's denial of the defendant's motion. *Id.* Similarly, evidence of a prosecution witness' intention to file a civil action against the defendant was "newly discovered" and sufficient to justify a

new trial. *United States v. Kladouris*, 739 F. Supp. 1221, 1224 (N.D. Ill. 1990).[6]

In the instant case, the prosecution argued that OTSB was a traditional lender making a credit decision to the Petitioners. It secured a conviction of the Petitioners on August 18, 1994. Less than two months after the verdict, the RTC then filed the D&O Complaint, alleging completely inconsistent facts and theories of OTSB's practices, and its relationships to LOCAL and Landmark. Of course, it was impossible for defense counsel to know of the government's intent to pursue this contradictory theory at the time of the trial. However, there can be no doubt that the use of the D&O Complaint as probative evidence of OTSB's relationship to the Petitioners would have significantly undercut the government's theory.

The following are only some examples of the positions taken by the RTC in the D&O Complaint:

- Oak Tree's loans were not based upon the ability of the borrower to repay, secondary sources of repayment, or appropriate outside appraisals or studies of value.

[Exh. 21 to Motion for New Trial, at 12];

- Oak Tree's directors approved loans for purposes of real estate development, without regard to a borrower's ability to repay the loan or other sources of repayment, and based primarily on their unsupported guesses as to the value of the underlying property.

[Exh. 21 to Motion for New Trial at 19];

- Thus, from 1986 to 1989, the director defendants did not change Oak Tree's "pawn shop lending" philosophy, their view of Oak Tree as a developer, or Oak Tree's grossly negligent underwriting practices.

[Exh. 21 to Motion for New Trial at 26].

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6. *Kladouris* also noted that the agent's intent to file the civil suit was *Brady* evidence which should have been disclosed by the prosecution. *Kladouris*, 739 F. Supp. at 1224.

The D&O Complaint directly supports the defense theory that OTSB was incapable of being influenced by the borrower representations, as OTSB was in reality a land developer who made its loans at the direction of Landmark, based upon Landmark's guesses as to the value of the underlying property. Again, this position is diametrically opposed to the government's position at trial, and negates the core allegations of bank fraud and conspiracy to commit bank fraud.

The government argued in the criminal trial that OTSB was a traditional lender who was defrauded by the Petitioners. Two months later, the RTC averred that the directors and officers of OTSB refused to analyze, rely, or otherwise consider borrower's financial information, tax returns, or appraisals. The inconsistency of these positions mandates a new trial.

Given that the jury was willing to acquit the Petitioners on one count, this additional evidence probably would have produced an acquittal on the remaining counts.

4. *Petitioners' conviction was obtained despite numerous structural errors which mandate a new trial.*

Petitioners conviction was obtained despite five instances of structural error in their trial.: (1) an improper jury instruction on "risk of loss" in the bank fraud counts; (2) an improper jury instruction that failed to list the necessary elements of the bank fraud counts; (3) an improper jury instruction that permitted the jury to convict petitioners of bank fraud for mere breach of fiduciary duty; (4) an improper jury instruction in the essential elements of fraudulent intent; and (5) an improper jury instruction on the elements of materiality in the false statement counts.

The Structural Errors contained in the jury's charge mandate a new trial, regardless of a showing of prejudice.

Structural error constitutes a "defect in the constitution of the trial mechanism" which requires reversal of a conviction because such error renders the trial an unreliable vehicle for the determination of guilt. *United States v. Olano*, 507 U.S. 725, 735, 113 S. Ct. 1770, 1778 (1993). Thus, a structural error defies analysis under FED. R. CRIM. P. 52, due to its "special category" of error which must be corrected regardless of their effect on the outcome of the case. *Id.* Whether a defendant fails to object

to structural error is irrelevant, as the error mandates reversal regardless of any harmless error analysis. *Chapman v. California,* 386 U.S. 18, 87 S. Ct. 824 (1967). A frequent source of structural error are defective jury instructions that do not require the government to prove every element of a crime beyond a reasonable doubt. *United States v Wiles,* 102 F.3d 1043, 1058 (10th Cir. 1996), *cert. denied,* 118 S. Ct. 363 (1997).

a. The trial court committed structural error by giving improper instruction on "risk of loss" in the bank fraud counts.

The trial court gave the following instruction on Counts 2 and 3, OTSB Fraud:

> Furthermore, it is not necessary that a financial institution suffer financial loss to support a conviction for bank fraud under the statute as charged in Counts 2 and 3; it is only necessary to prove that the fraudulent scheme or artifice placed the bank at risk of loss.

This instruction did not properly set forth the term "*risk of loss.*" In *United States v. Schnitzer,* 145 F.3d 721 (5th Cir. 1998), the Court emphasized that "risk of loss" means something more than the inherent risk of loss in any loan transaction. *Id.* at 735; *see also United States v. Beuttenmuller,* 29 F.3d 973, 981 (5th Cir. 1997), *rev'd on other grounds,* 775 F.3d 1500 (1998) (implying that an overpayment in a value for value transaction is insufficient to sustain a conviction for bank fraud because this type of transaction is not a "criminal venture"); *United States v. Bridges,* 820 F. Supp. 475, 476 (W.D. Mo. 1993) (acquitting the defendant of bank fraud because if there was a risk of loss suggested in the present case, it cannot be classified as high-risk, or anything demonstratively more hazardous than the risk of a normal loan.)

The instruction in this case did not distinguish between the inherent risk of a normal loan and the type of actual risk (deprivation) which is criminal conduct or bank fraud. Therefore the jury could have convicted the Petitioners upon a finding that OTSB was exposed to the normal risk inherent in any loan transaction. A bank fraud conviction cannot be sustained upon the "risk of loss" that accompanies every commercial loan, because it is not a "criminal venture." *Schnitzer,* 145 F.3d at 745. The magnitude of this error is compounded when one considers the

recklessness of OTSB's "pawn shop" lending philosophy, which resulted in massive losses causing the failure of the institution. Virtually every major loan OTSB made had a high "risk of loss," as the vitality of these loans was contingent upon the land securing the loan not suffering a loss in value. When the real estate market crashed in the late 1980s, OTSB's portfolio disintegrated, leading to huge losses.

The Petitioners submit that this instruction, which did not properly define a significant term of the bank fraud counts, and could have led to a conviction based on nothing more than the jury's reaction to OTSB's lending practices, constitutes a structural error.

b. Structural Error occurred when the jury charge failed to properly submit the essential elements of the offense.

The Petitioners would show that the charge to the jury was erroneous because it failed properly to define how criminal liability could arise from a *failure to disclose*.

A *failure to disclose* can become bank fraud only if the defendant knows of the material information and knows that it should be disclosed. *United States v. Lennon*, 751 F.2d 737 (5th Cir. 1985). The court did not use this definition in instructing the jury; therefore the jury could have found the Petitioners guilty based upon a failure to disclose without also finding that Petitioners knew of the information; that if they knew it, they also knew is should be disclosed, and that if they knew the information, whether they had any legal duty to disclose.

The jury charge in the Petitioners' case did not require the jury to find beyond a reasonable doubt that Petitioners had a legal duty to disclose any information to the OTSB. *Chiarella v. United States*, 63 L. Ed. 2d 348, 361 (1980).

These defects in the charge could have resulted in a conviction on less than the required elements of the offense. As such, Petitioners contend that they constitute structural error, and the failure to raise this point at either trial or appeal should not preclude review at this time.

c. Structural error occurred when the jury charge permitted the jury to convict Petitioners of nothing more than a breach of fiduciary duty.

> Where an individual [Petitioners] standing in a fiduciary relation to another [OTSB] conceals material information [the cost of Upper Etiwanda] that the fiduciary is legally obliged to disclose, that non-disclosure does not give rise to mail fraud liability unless the omission can or does result in some tangible harm.

United States v. Carpenter, 791 F.2d 1024, 1035 (2nd Cir 1986), *aff'd*, 484 U.S. 19, 108 S. Ct. 316 (1987); *McNally v. United States*, 483 U.S. 350 (1987). However, lack of information that might have an impact on the decision where government money is spent (the cost of Upper Etiwanda), without more, is not a tangible harm, and therefore does not constitute a deprivation of § 1341 "property." As stated by the Second Circuit, "[t]o convict the government had to establish that the omission caused actual harm [to the lender]. . . . The jury should have been so instructed." *United States v. Mittelstaedt*, 31 F.3d 1208, 1217 (2nd Cir. 1994).

The instructions given effectively permitted the jury to convict Petitioners for nothing other than a breach of fiduciary duty. *Mittelstaedt* recognized that it would be manifestly improper to criminalize every breach of fiduciary duty, and expressly refused to do so. *Id.* at 1218. *Mittelstaedt* is instructive despite its analysis of the mail fraud statute, as it is well settled that Congress modeled Section 1344 on the mail and wire fraud statutes, and that the usual practice is to look to precedents under those statutes to determine its scope and proper interpretation. *United States v. Saks*, 964 F.2d 1514 (5th Cir. 1992).

In this case, the Upper Etiwanda tract was subsequently sold for more money than OTSB loaned, and as a result OTSB was repaid in full for the portion of the loan secured by this collateral. Thus, the omission, or non-disclosure, could not have resulted in some tangible harm.

d. Structural error occurred when the jury charge failed properly to instruct the jury of the essential elements of fraudulent intent.

Petitioners would show that the charge to the jury was erroneous because it failed to instruct the jury that in order to be guilty of fraud the government must prove beyond a reasonable doubt that Petitioners possessed a "fraudulent intent." *United States v. Starr*, 816 F.2d 94, 98 (2nd Cir. 1987). This requires the government to present evidence of intent to harm OTSB. OTSB knew exactly what the bargain was and they constructed the bargain, and the terms of the deal, to benefit OTSB. Vossler's testimony was that the transaction was to benefit OTSB, not harm it.

Even if it was construed as an attempt to deceive OTSB, such an attempt would not constitute an attempt to defraud OTSB where there is no showing "that some actual harm or injury was contemplated by the scheme." *Starr*, 816 F.2d at 101.

Acting in accordance with the wishes of a corporate agent (Vossler) is clear evidence of a lack of intent to defraud. *United States v. D'Amato*, 39 F.3d 1249, 1257 (2d Cir. 1994). The district court failed to so instruct the jury, thereby committing structural error.

e. The trial court committed structural error by giving an improper instruction on the elements of materiality in the false statement counts.

The trial court gave the following instruction as to materiality: "you need not consider whether the false statement was a material false statement, even though that language is used in the indictment. This is not a question for the jury to decide." *United States v. Gaudin*, 515 U.S. 506 (1995), later held that materiality was a fact question for the jury's consideration. Later, *United States v. Wells*, 519 U.S. 482 (1997) seemingly mooted this issue by holding materiality was not an element of § 1014. In *Marks v. United States*, 430 U.S. 197, 97 S. Ct. 990 (1977), the Supreme Court faced a similar problem of changing law. In *Marks*, the defendants were charged with violating a federal statute outlawing the transportation of obscene materials. *Id.* at 991. At the time the conduct occurred, controlling case law included a test that material was not pornographic unless it is "utterly without redeeming social value." *Id.* at

992 (citing *Memoirs v. Massachusetts,* 383 U.S. 413, 86 S. Ct. 975 (1966). Prior to trial, the Supreme Court altered this test in *Miller v. California,* 413 U.S. 15, 93 S. Ct. 2607 (1973), which adopted a test inquiring into "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* The defendants were tried on the more stringent *Miller* test, and convicted. The *Marks* court held that trying the defendants on the more stringent *Miller* test was unconstitutional, and reversed for a new trial. *Id.* at 995. The Supreme Court summarized its reasons with:

> We therefore hold . . . that the Due Process Clause precludes the application to petitioners of the standards announced in *Miller v. California,* to the extent those standards may impose criminal liability for conduct not punishable under *Memoirs.* Specifically, since the petitioners were indicted for conduct occurring prior to our decision in *Miller,* they are entitled to jury instructions requiring the jury to acquit unless it finds that the materials involved are "utterly without redeeming social value."

Id. at 993. *Marks* is indistinguishable. Petitioners were indicted at a time when section 1014 included materiality. Materiality should have been submitted for the jury's consideration. The fact that *Wells* changed the elements of section 1014 should remain fundamentally irrelevant to the analysis, as *Marks* teaches that it cannot be retroactively applied. Doing otherwise would result in a continuing denial of Petitioners' due process rights, and a violation of the Constitution's prohibition against *ex post facto* laws. *Id.* at 992.

III. PETITIONERS CONVICTION WAS OBTAINED IN VIOLATION OF 18 U.S.C. § 201(c)(2).

This error was not raised at Petitioners' trial or on appeal; thus Petitioners must meet the two-part cause in the prejudice test. Under that test, to obtain collateral relief based upon trial errors to which no contemporaneous objection was made, petitioner must show both: Cause excusing their procedural default, and actual prejudice resulting from the errors of which they complain. *United States v. Brady,* 456 U.S. 152 (1982).

The cause prong of this standard is easy to satisfy in this case. A petitioner seeking collateral relief may be excused from making an

that test, to obtain collateral relief based upon trial errors to which no contemporaneous objection was made, petitioner must show both: Cause excusing their procedural default, and actual prejudice resulting from the errors of which they complain. *United States v. Brady,* 456 U.S. 152 (1982).

The cause prong of this standard is easy to satisfy in this case. A petitioner seeking collateral relief may be excused from making an objection in the original proceeding if the basis for the objection was not known until after the petitioner's conviction became final. *United States v. Guerra*, 94 F.3d 989 (5th Cir. 1996), *United States v. Logan*, 133 F.3d 353 (5th Cir. 1998).

To show actual prejudice, Petitioner must demonstrate that, but for the alleged error, they might not have been convicted. *United States v. Guerra, Id.* Quite obviously, had the government been unable to use the testimony of Barrack and Ohanian, petitioners would not have been convicted. Consequently, prejudice is shown.

The testimony of pivotal witnesses Barrack and Ohanian against Petitioners was procured in violation of 18 U.S.C. § 201(c)(2). *United States v. Fraguella,* 1998 WL 560352 (E. D. La. Aug. 27, 1998). The statute is eminently clear on its face and there can be no doubt that the Government violated the statute with its promises of lenience to Barrack and Ohanian.

In *United States v. Fraguella,* 1997 WL 560352 (E.D. La. Aug. 27, 1998), the trial court applied 18 U.S.C. § 201(c)(2) and granted Fraguella a new trial, later withdrawn for other reasons. In *Fraguella,* the trial court acknowledged that *United States v. Singleton,* 144 F 3d 1343 (10th Cir. 1998), which has since been reversed *en banc,* had been vacated prior to its decision. Since *Fraguella,* the Fifth Circuit in *United States v. Haese,* 162 F.3d 359 (5th Cir. 1998) has unequivocally indicated its distaste for enforcing Section 201(c)(2) against the Government.

The *Haese* opinion represents an extremely results-oriented effort by a Fifth Circuit panel which failed to conduct any analysis of whether Section 201(c)(2), as drafted by Congress, applies to the Government. *Haese's* comment that applying Section 201(c)(2) to the Government "would apply shackles to the government in its pursuit to enforce the law" is exceedingly ironic, when one considers it was the Government's violation of Section 201(c)(2) that deprived petitioners of their liberty,

of Section 201(c)(2), therefore, is one that prohibits all agreements for testimony, irrespective of who enters into them." This was recognized in *Lowery* and *Fraguella.*

Unfortunately, the federal courts of appeals have apparently ignored the United States Supreme Court's long standing rule that statutes that are unambiguous and clear on their face are to be applied as written, not as construed by federal courts to achieve what courts perceive to be the true Congressional purpose. Interestingly, the Supreme Court has recently strictly construed the false statement statute (18 U.S.C. § 1014) as not requiring materiality because the word "material" does not appear in the statute. *United States v. Wells,* 519 U.S. 482, 117 S. Ct. 921 (1997) (finding a "natural reading" of 18 U.S.C. § 1014 does not include materiality as an element.) *Wells* was the Supreme Court's response to *United States v. Gaudin,* 515 U.S. 506, 115 S. Ct. 2310 (1995), which held that the materiality issue must be submitted to the jury. It was the strength of the *Gaudin* decision which led to the release of Petitioners during the appeal of this conviction, and the *Wells* decision which returned them to prison.

Now, when the application of the logic and analysis used in *Wells* would mandate a new trial, the Court of Appeals has suddenly reversed field and decided that strict construction of unambiguous statutes is not appropriate. The net effect is that in both instances petitioners have been deprived of their fundamental constitutional rights due to the vacillation of the federal courts. While the Fifth Circuit may believe that a correct application of Section 201(c)(2) is "nonsensical," this does not change the undisputed fact that two of the government's key witnesses were "bought" with promises of lenience, key documents were suppressed by the government, and the government used threats of prosecution to intimidate key defense witnesses into silence. Permitting these dilatory tactics surely does not comport with the minimum safeguards guaranteed to every defendant by the United States Constitution.

An instruction limiting the effects of such "bought" testimony would not have helped. The United States Supreme Court has repeatedly recognized that limiting instructions in these circumstances are insufficient to prevent reversible error. *Bruton v. United States,* 391 U.S. 123, 88 S. Ct. 1620 (1968); *Anderson v. United States,* 318 U.S. 350, 63 S. Ct. 599 (1943).

CONCLUSION

The government suppressed material evidence that, if disclosed to the Petitioners, would have made an acquittal on the remaining counts reasonably probable. The district court erred by failing to properly apply the *Brady* test for the suppressed evidence. Even assuming that the government did not suppress the evidence, a new trial is warranted. In addition, the violation of Section 201(c)(2) and the structural errors committed were *per se* errors mandating relief.

Respectfully submitted,

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APPENDIX

APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED NOVEMBER 23, 1998

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-30133
Summary Calendar

D.C. Docket No. 93-CR-327-C

UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

W HAROLD SELLERS

Defendant – Appellant

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans.

Before REAVLEY, BENAVIDES, and PARKER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

* * *

APPENDIX B — ORDER AND REASONS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA DATED JANUARY 20, 1998, FILED JANUARY 21, 1998 AND ENTERED JANUARY 22, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 93-0327
SECTION "C"(2)

UNITED STATES OF AMERICA

VERSUS

W. HAROLD SELLERS, ET AL

ORDER AND REASONS

Defendants W. Harold Sellers ("Sellers") and Robert Dupre ("Dupre") filed a joint Motion for New Trial for Brady Violations and On Grounds of Newly Discovered Evidence. Having reviewed the facts, memoranda, the law, the record and in particular the trial testimony of Ernest Vosser and John Ohanian, as well as other portions of the trial testimony, the Court concludes the motion should be **DENIED**.

SELLERS and DUPRE were convicted of conspiracy, 18 U.S.C. §371, two counts of bank fraud, 18 U.S.C. § 1344, two counts of making false statements to a federally insured bank, 18 U.S.C. § 1014 and eight counts of money laundering, 18 U.S.C. § 1957.

Appendix B

The alleged Brady violations and newly discovered evidence primarily consist of notes and memoranda apparently authored by government witnesses Ernest Vosser and John Ohanian, involving the events underlying Counts 2 and 4 of the indictment.

Assuming, but not deciding, that the government was in some manner remiss in failing to discover and disclose these documents, the Court finds them lacking in sufficient significance to undermine the verdict. Substantively, the documents do not in any manner negate the core allegations of those counts — that the defendants did not disclose to Oak Tree Savings Bank ("OTSB") their connections to Minter interest, thereby misrepresenting the cost of acquiring the Upper Etiwanda tract of land and likewise the defendants misrepresented to OTSB the balance owed to Lomas and Nettleton for the other properties involved in the loan. Even coupled with the defense "pawn shop" mentality theory attributed to Vosser, the documents do not detract from the fact that Oak Tree Savings Bank loaned the defendants the money based on the defendants' misrepresentation that those funds were the amounts needed to retire their debt and to "purchase" Upper Etiwanda. That Vosser may have also considered the loan transaction a "good deal" for OTSB, based on his own appraisal of the properties, does not erase the deception. OTSB would have had an even better deal had it not been defrauded[1].

The newly discovered documents are also of limited significance for impeachment. During cross-examination at

1. The Court notes that the Fifth Circuit has already found the evidence sufficient to convict, based on the defendants' misrepresentations.

trial, Vosser was impeached on a number of relevant points and evidenced a pervasive lack of memory on most of the details of the transactions, which had occurred some seven years previous. Further impeachment based on these documents would have been cumulative. In addition Vosser acknowledged several times at trial his "pawn shop" mentality and his reliance on his own evaluation of the worth of the properties in deciding to recommend the loan to OTSB. The defense theory in that regard was fully aired for the jury to consider.

The defendants also cite an Office of Thrift Savings examiner's report regarding OTSB's underwriting deficiencies that was allegedly improperly withheld from them in pretrial discovery. The Court has reviewed the document as well as the testimony from the trial. The Court allowed sufficient evidence to be presented at trial regarding OTSB's sloppy and incomplete record-keeping. The fact that OTSB did not mind its own store was not a license to come in and rifle through its cash register with impunity.

The Motion for a New Trial is **DENIED**.

New Orleans, Louisiana, January 20, 1998.

s/ Ginger Berrigan
GINGER BERRIGAN
UNITED STATES DISTRICT JUDGE